RAMLAN SALLEH

v.

PUBLIC PROSECUTOR

SUPREME COURT, KUALA LUMPUR
WAN SULEIMAN SCJ
MOHD. AZMI SCJ
SYED AGIL BARAKBAH SCJ
[CRIMINAL APPEAL NO. 13 OF 1986]
11 MAY 1987

CRIMINAL LAW AND PROCEDURE: *Murder by gun shot - Ground of appeal - Failure to direct jury on third alternative verdict - Causing death by rash or negligent act.*

CRIMINAL LAW AND PROCEDURE: *Jury trial - Duty of Judge - Defence case - Penal Code - Sections 300, 302, 304A.*

The appellant was convicted of murder of his immediate superior officer under s. 302 of the Penal Code. At the material time, the appellant was on duty at the guardroom at the entrance of the camp. While the deceased was entering the camp, as a pillion rider, the appellant fired shots and killed the deceased. The alleged motive for killing was the cancellation of the appellant six-day leave by the deceased. The shooting occurred one and half hours after the said cancellation.

During the trial for murder the appellant gave evidence that he was angry with the deceased. He was provoked when the deceased approached the camp. He fired several shots at the deceased to frighten the deceased. He never intended his shots to kill the deceased. The learned Judge directed the jury to consider two possible verdicts - either guilty of murder or guilty of culpable homicide not amounting to murder. The appellant was convicted for murder. The appellant appealed on the ground that the learned Judge failed to direct the jury on a third alternative verdict namely guilty of an offence under s. 304A of the Penal Code for causing death by rash or negligent act.

Held:

[1] In jury trial, the first duty of the Judge in dealing with the defence case is to put to the jury the defence put up by the accused even if such defence appears to him to be too far-fetched and ought to be rejected. Such defence may constitute a lesser offence than murder, or it may even be lesser than culpable homicide not amounting to murder.

[2] In the light of the evidence before the Judge, it was the duty of the learned Judge in this particular case to have directed the jury on the third alternative verdict and it was for the jury to accept or reject the defence. The failure to do was fatal in the circumstances.

[Appeal allowed. Conviction quashed and retrial ordered.]

Case referred to:
Loo Geok Hong v. PP [1961] MLJ 157

Legislation referred to:
Penal Code, ss. 300, 302, 304A

For the appellant - G. Naughton Christie; M/s. G.N. Christie & Co.
For the public prosecutor - Ng Aik Guan, Deputy Public Prosecutor

JUDGMENT

Mohd. Azmi SCJ:

On 16 March 1986, the appellant was convicted for murder in contravention of s. 302 of the Penal Code. He appealed against his conviction and on 23 February 1987 we set aside his conviction and ordered a retrial before another Judge and jury. We now state our reasons for quashing the conviction.

The charge against the appellant was framed as follows:

> That you on 25 July 1983 at about 3.30 p.m. in front of Quarters Guard 4th Royal Cavalry Regiment, Lapangan Terbang camp, Sungai Petani, in the district of Kuala Muda, in the state of Kedah, did commit murder by causing the death of one Annuar bin Abd. Hamid, and that you have thereby committed an offence punishable under s. 302 of the Penal Code.

At the relevant time, the appellant was a member of the 4th Royal Cavalry Regiment stationed at Lapangan Terbang camp, Sungai Petani. It was the case for the prosecution that on the date and time as stated in the charge, the appellant was on guardroom duty at the entrance to the military camp when he shot and killed the deceased with M.16 rifle. Altogether about eight shots in two sequence were fired in rapid succession whilst the deceased was entering the camp on a motorcycle as a pillion rider, and one of the three shots which hit him proved to be fatal. The deceased, Sergeant Annuar bin Abd. Hamid, was the appellant's immediate superior officer, and the alleged motive for the shooting was the cancellation of the appellant's six-day leave, as a result of disciplinary proceeding on a traffic charge lodged by the deceased against him for not wearing a crash helmet when riding a motor-cycle. There was evidence that the appellant had been selected to represent his Regiment in rugby, and the purpose of the six-day leave was to enable him to report at the rugby training centre in Ipoh. The deceased had earlier on refused the application for leave on the ground that the appellant had recently taken leave, but the appellant managed to get his leave approved by the other officers. It would appear that it was then that the deceased brought the traffic violation charge against him which resulted in the cancellation of the leave. The appellant was informed of the cancellation at about 2 p.m. and the shooting occurred about one and a half hours later. The learned trial Judge rightly reminded the jury that to constitute murder the prosecution was not obliged to prove motive as distinct from intention to kill, and he also quite properly put to the jury the incident of leave cancellation as a basis for the defence of grave and sudden provocation which would reduce the offence to culpable homicide not amounting to murder. The learned Judge at the end of his 50 page summing-up, directed the jury to consider two possible verdicts:

(1) Guilty of murder;

(ii) Guilty of culpable homicide not amounting to murder.

It is reasonable to assume that the jury had considered the defence of provocation and had rejected it, and that they were left with only one other verdict i.e., either guilty or not guilty or murder.

Before us Mr. Christie for the appellant had no reservation in commending the learned trial Judge in the way he had so fairly and painstakingly directed the jury on the law of murder and culpable homicide not amounting to murder, particularly on the defence of provocation. His sole complaint was that the learned trial Judge had omitted completely to put to the jury a third alternative verdict arising from the appellant's defence, namely, guilty of an offence under s. 304A of the Penal Code for causing death by rash or negligent act. In our view,

there was merit in Mr. Christie's complaint having regard to the evidence,although s. 304A had not been specifically raised by him in his submission to the jury. In evidence, the appellant had testified that he was upset when he was informed about the cancellation of his leave, and he was still upset when he went on duty at the guardroom. He was angry with the deceased for being instrumental in the cancellation of his leave. He became even more angry and provoked when he saw the deceased approaching the camp on a motor-cycle. He fired several shots towards the moving motor-cycle at different directions "just to frighten him". He had no thought of killing the deceased, and that was why he put the M.16 rifle at semi-automatic position because it would be dangerous if he had selected the automatic position. He never intended his shots to hit the deceased. To be fair to the learned trial Judge he did in fact at p. 30 of his summing-up draw the jury's attention to the fact that the defence was complete denial of having any of the intention specified in s. 300 as constituting the offence of murder. In fact at p. 37 of his summing-up, the learned Judge would appear to have appreciated the defence position although he did not elaborate on it as much as he did on the defence of provocation. The crux of the defence "of intention to frighten and not to kill" was merely put to the jury in the following manner:

> The main thrust of the defence of the accused is that at the time of the shooting he had never intended to kill or even to wound the deceased. He merely wanted to frighten the deceased. He was at that time very angry and could not control himself. In fact he was in a confused state.

In jury trial, the first duty of the Judge in dealing with the defence case, is to put to the jury the defence put up by the accused even if such defence appears to him to be too far fetched and ought to be rejected. Such defence may constitute a lesser offence than murder, or it may even be lesser than culpable homicide not amounting to murder. The trial Judge is of course at liberty to comment on the evidence and in rare and appropriate cases may even make unfavourable remarks on the defence put up by the accused provided he makes it very clear to the jury that they are not bound by his view and opinion on issues of fact. His next duty is to put to the jury all available defences whether or not relied upon by the accused, having regard to the evidence. But as was held by the Court of Appeal in *Loo Geok Hong v. PP* [1961] MLJ 157, the way in which the jury are to be directed on available defences is a matter for the trial Judge having regard to the evidence with which he is concerned. What is important is the effect and not the form of the direction.

Having regard to the evidence, we were of the view that it was inadequate for the learned Judge merely to refer to the jury to the defence story of his intention "merely to frighten the deceased", as only relevant to negative the intention to kill, but he should have gone one step further by leaving it to the jury to consider a possible third verdict of guilty under s. 304A of the Penal Code for firing the M.16 rifle in a rash or negligent manner even if they were to conclude that the shooting was "merely to frighten the deceased". Although the learned Judge did briefly refer to such defence, it was his duty in this particular case to put it to the jury as a third alternative verdict, and it was for the jury to accept or reject the defence. The failure to do so was fatal in the circumstances. In this particular instance, the importance of putting the defence story for two distinct purposes assumed particular importance in view of the thorough manner in which the learned trial Judge had dealt with the defence of provocation. So much so, it was more than likely that any reasonable jury would have thought that the defence put by the appellant was merely the defence of provocation and not also one of shooting at the direction of a moving motor-cycle on which the deceased was a pillion rider, for the purpose of frightening him. It was unfortunate that in this particular case the thoroughness of the trial Judge's direction to the jury on the

alternative verdict of culpable homicide not amounting to murder on ground of provocation, which in itself was not wrong in law, had the effect of obliterating or diluting the brief direction on the defence of "merely to frighten the deceased". The two alternative verdicts had the effect of restricting the jury to consider the defence story only as regard intention to kill but not as a possible defence of reducing the offence to one under s. 304A. In the light o the evidence before him, the learned Judge should, having recognised the main thrust of the defence, put to the jury the verdict they should return not only in the event that they rejected the defence story "to frighten the deceased", but also in the event of them accepting such defence. If only the third alternative verdict under s. 304A had been put to the jury, the summing-up of the learned Judge would have been beyond criticism.

For reasons we have stated, we quashed the conviction and ordered a retrial.

Also found at [1987] 2 CLJ 300